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IN THE

Supreme Court of the United States

No. 205

October Term, 1948

EUGENE M. MURPHEY, JR., *et al.*,

Petitioners,

—v.—

M. T. REED, *et al.*, a copartnership doing business as M. T. REED CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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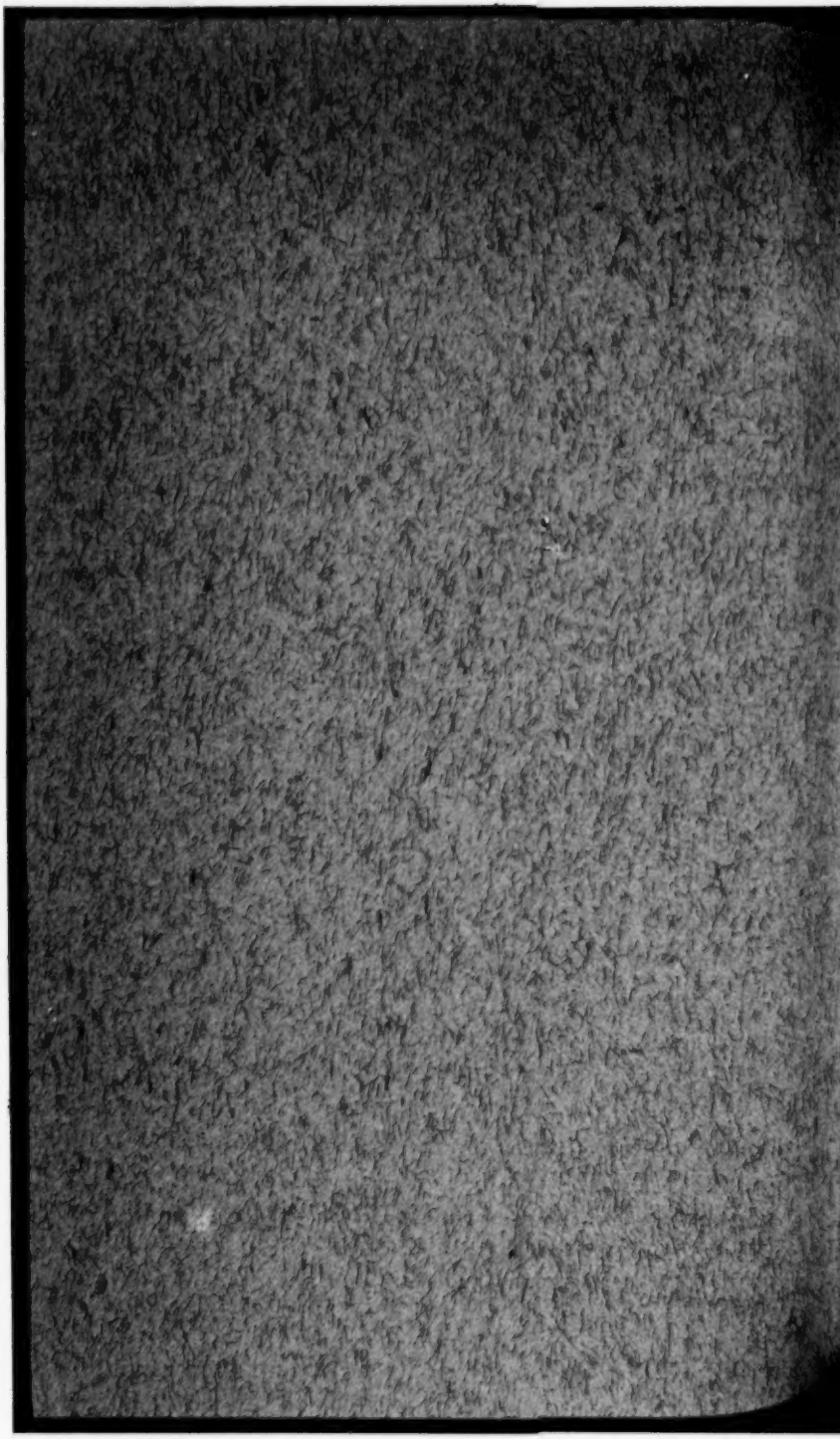

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court of the United States for the Southern District of Mississippi (R. 318-319) is not officially reported. The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 168 F. 2d 257.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on April 7, 1948. A petition for rehearing was filed on April 23, 1948 and was denied on June 9, 1948. The petition for writ of certiorari was filed on August 9, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether petitioners, employed as guards, timekeepers, timecheckers, material checkers, engineers, draftsmen, rodmen, building inspectors, blue-print machine operators, paymasters, accountants, stenographers, clerks, lumber expediter, purchasing agent, superintendent of motor pool, chauffeur, and firemen, in connection with the construction, wholly in Mississippi, of new navy camps, under cost-plus contract with the United States, and in miscellaneous capacities such as draftsman, storekeeper, chauffeur, accountant, and clerk-typist in connection with the maintenance and operation of a United States Naval Advance Base Depot in Mississippi, under similar cost-plus contract, were "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*, are set forth in the Appendix, *infra*, pp. i-viii.

Statement

This action was brought by petitioners under the Fair Labor Standards Act to recover overtime compensation, liquidated damages, and counsel fees for the period between July 8, 1942 and August 19, 1945.[1] The vast majority of the claims are based upon employment in connection with the construction, wholly in Mississippi, of new Navy encampments. The remaining claims are based upon em-

[1] Only three of the 117 petitioners were employed during any part of 1944 or 1945 (R. 124-125, 185-188, 266-268).

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ployment in connection with the maintenance and operation of one of the camps, a United States Naval Advance Base Depot (R. 118-310).

The case was tried upon (1) a stipulation that the respondents' request for admission of fact and the petitioners' reply thereto should constitute the factual proof, and (2) the testimony of one witness[2] for petitioners (R. 314, 355-363, 364).

The relevant facts may be summarized as follows:[3]

As part of the government defense program during the past war, the Chief of the Bureau of Yards and Docks, Navy Department, in 1942 entered into two cost-plus-a-fixed-fee contracts[4] with the respondents, a copartnership doing business as M. T. Reed Construction Company. The first of these contracts was for construction of a navy camp for training Construction Battalions, popularly known as Seabees, and a United States Naval Advance Base Depot

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[2] This witness testified regarding the activities of several of the petitioners (R. 358-360) and stated that he believed he "could trace the activities of each employee and connect it either directly or indirectly with the materials and supplies that came from within the state and from without the state" (R. 357).

[3] The District Court made no findings as to the activities of the individual petitioners. Nor did it make any findings showing the relationship of any particular petitioners to interstate commerce. Its findings are devoted to a description of the cost-plus contracts, the respondents' activities, the salary arrangements, and a general conclusion that the Advance Base Depot was used in commerce and that all the petitioners were engaged in commerce (R. 327-345).

[4] Under these cost-plus contracts, the United States is obligated to reimburse respondents for moneys paid in resisting, settling, or otherwise disposing of the claims involved in this action. Defense of the litigation was initially undertaken by the United States Attorney, Jackson, Mississippi, at the request of the Navy Department. After the United States Attorney noted the appeal from the judgment of the District Court for petitioners, defense of the action was transferred to private counsel pursuant to new procedures adopted by the Government.

at Gulfport, Mississippi; the second was for maintenance and operation of the Naval Advance Base Depot (R. 30-31).

The respondents performed these contracts through separate and distinct organizations with separate and distinct payrolls (R. 32) under close supervision by the Navy Department and its representatives (R. 38, 40, 41, 44, 46, 47, 48, 49, 89, 91, 96, 104, 111, 113).

New Construction. Pursuant to the construction contract, the respondents engaged in the new and original construction of warehouses, buildings, barracks, mess halls, railroad spurs, a recreation hall, a laundry and other installations appropriate to navy encampments at Gulfport, Mississippi.[5] In addition, they constructed a rifle range 25 miles north of Gulfport and an ammunition storage depot (R. 33-36).

Construction materials for the project were obtained from local and out-of-state sources. Approximately 40 per cent of the dollar value of purchase orders was issued to out-of-state vendors (R. 34-35).

The great majority of the petitioners were employed as field or office workers in connection with the new construction project during all or part of their employment.[6] They worked as guards, timekeepers, timecheckers, material checkers, draftsmen, rodmen, building inspectors, blueprint machine operators, paymasters, accountants, stenog-

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[5] Preliminary work was begun in the latter part of April, 1942. Actual construction in the field commenced on or about May 15, 1942 and was completed April 6, 1943. Incidental office work was completed June 29, 1943 (R. 32).

[6] Of the 117 petitioners, eighty-nine were new construction employees throughout their employment, twenty-one were new construction employees during part, and maintenance and operation employees during the remainder, of their employment; seven were maintenance and operations employees throughout their employment (Exhibits 1 through 133, R. 118-130).

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raphers, clerks, lumber expediter, purchasing agent, superintendent of motor pool, chauffeur, and fireman (R. 64-102).

The guards performed custodial duties at various posts throughout the construction area (R. 53-76).

The timekeepers kept time records of construction workers, including carpenters, concrete and steel construction workers, bricklayers, plumbers, builders, and mechanics. They also kept the time of truck drivers primarily engaged in hauling materials and equipment which had previously come to rest in and about the project. As an incident of their timekeeping duties, several timekeepers kept time records of laborers, among others, who spent part of their time unloading interstate shipments (R. 78-81, 118).

The timecheckers, under the supervision of the Navy Auditor, checked the timekeepers to see that records were properly kept (R. 79). The material checkers received and checked the materials used in construction work as to quantity and quality and prepared a receiving and inspection (R & I) report (R. 77-78).

The engineers (R. 90, 91-94), draftsmen (R. 91, 97), blue-print machine operators (R. 94-95), building inspectors (R. 95-96, 117), and rodmen (R. 96) performed various duties relating to the planning and the construction of buildings and other installations at the project. The fireman sprinkled freshly laid concrete with water and was subject to call in case of fire (R. 76-77); the chauffeur drove maintenance and operations officials and employees to points in and about the depot (R. 98); the lumber expediter facilitated lumber shipments (R. 100-101); and the superintendent of the motor pool was in charge of a pool of passenger motor cars (R. 101).

The accountants, clerks, and other office personnel engaged in various activities such as maintaining payroll

records of construction workers (R. 81-82); handling war bond accounts, which involved mailing some bonds to extra-state points from time to time (R. 82-83); preparing social security and withholding tax reports (R. 83-84); preparing for payment invoices covering construction materials (R. 84); preparing vouchers in connection with the payment of invoices received from vendors of construction materials (R. 85-86); checking cancelled checks with payroll records and vouchers (R. 86); recording and reporting the number of hours a particular item of rental equipment was used in construction work (R. 87-88); posting data on fingerprint records subsequently sent to the Federal Bureau of Investigation (R. 88); typing lumber purchase orders (R. 88); maintaining cost records (R. 89); maintaining an inventory of the materials and equipment on hand (R. 89-90); and handling and distributing office supplies to office workers (R. 95).

Maintenance and operations. Under the maintenance and operations contract, the respondents maintained and operated the Naval Advance Depot where materials and equipment were received from all parts of the United States for storage, assembly, and reshipment to Seabees at advance bases in the various war theatres (R. 31, 37).[7]

Most of the goods received at the depot were stored in one of the maintenance and operations warehouses or in the open storage area. The period of storage varied from a few days to several months. Incoming and outgoing shipments were of daily occurrence (R. 40). And direc-

[7] Additional functions of the respondents under this contract included purchase, assembly, fabrication, testing, and preparation of materials and equipment for advance bases. However, only a small amount of miscellaneous items were fabricated in the performance of the contract (R. 31, 37). There is no evidence as to the time when such fabrication occurred or that it occurred regularly. Nor is there any evidence that any activities of any of the petitioners was related to such fabrication.

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tions were received daily from Washington for the shipment of materials and equipment on hand to advance bases (R. 41).

For a period of about six months, the respondents purchased, upon a reimbursable basis, a substantial amount of materials and equipment needed for Seabee Battalions overseas. All purchases were made on the basis of requirements of the Bureau of Yards and Docks, Navy Department, and the respondents regularly received instructions from the Bureau regarding the purchases to be made (R. 38).

As indicated above,[8] twenty-eight of the petitioners were maintenance and operations employees during all or part of their employment. Like the *new construction* employees, they were employed in a variety of capacities.[9] They engaged in activities such as maintaining payroll records (R. 103), handling war bonds (R. 102), preparing invoices for payment (R. 102), entering paid invoices in a voucher register (R. 102), managing the shipping department (R. 103), posting the bill of lading and invoice register (R. 104), keeping an inventory of automobile parts used in the maintenance of vehicles used at the depot (R. 104), allocating storage space (R. 104-105), operating a blueprint machine (R. 105), checking the time and attendance of maintenance and operations employees (R. 105-106), maintaining cost records (R. 106), checking mechanical equipment as to condition (R. 106-107), traffic management (R. 107), storekeeping (R. 107-108), chauffeuring (R. 108), general accounting (R. 108), expediting delivery of purchases (R. 108-109), studying records and under-

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[8] At p. 4, footnote 6.

[9] Draftsman, storekeeper, accountant, timechecker, expediter, assistant coordinator, office manager, personnel director, clerk, clerk-typist, chauffeur, blueprint-machine operator, engineer, technician, superintendent of motor pool, and special assistant to manager (R. 102-113).

going training for the job of supervising a perpetual inventory of stock (R. 109), preparing "assembling lists" used in connection with exporting materials to advance bases (R. 110-111), hiring and assigning new employees to departments where there were vacancies (R. 111), managing field operations relative to receipt and shipment of materials (R. 111-112), managing the operation and maintenance of heavy equipment used in loading and unloading (R. 112), and supervising a motor pool (R. 113).

On the above facts, the District Court held that the 117 petitioners[10] involved herein were engaged in commerce (R. 318, 345) within the meaning of the Fair Labor Standards Act and entered a judgment granting the relief sought (R. 323-327).

On appeal, the Circuit Court of Appeals for the Fifth Circuit reversed. It was of the view that, even apart from the wartime cost-plus contracts and vital war operations involved in the case, the petitioners, on the undisputed record evidence, were not engaged in commerce within the meaning of the Fair Labor Standards Act. 168 F. 2d at 261. It pointed out that: (1) work such as that performed by the great bulk of the petitioners, who engaged solely in local intra-state building activities throughout their employment, has uniformly been held to be outside the coverage of the Act; and (2) the petitioners had wholly failed to discharge their burden of proving that they, as dis-

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[10] This action was brought by 121 named plaintiffs and two intervenors (R. 2-9, 18, 26). As indicated above, the District Court's judgment was entered for 117 of these claimants. With respect to the six remaining claimants the record discloses: there was no evidence supporting the claims of three individuals who could not be identified on the defendants' payroll (R. 116-117); Thomas A. Williamson, had been listed twice in the complaint (R. 2-3, 117); J. Warren Patterson did not work any hours in excess of 40 in any workweek during the period for which overtime was sought (R. 5, 254); and Eddie Spiers had no claim for overtime (R. 117).

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tinguished from their employers, were engaged in commerce, or in activities so closely related to commerce as to bring them within its scope.[11] However, the Court stated it preferred to rest its decision on the broad general proposition that "employees of a wartime cost-plus contractor with the United States government employed during a war in operations vital to the war effort" are not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act. *Id.* at 262-263. One judge dissented from the conclusion of the majority which he stated to be "that there can be no commerce in war supplies and equipment for the use of the armed forces," but conceded that he was greatly impressed with some of the reasons advanced by the majority for its view that the petitioners had failed to sustain their burden of proving that they, as distinguished from their employers, were engaged in commerce or in the production of goods for commerce. *Id.* at 263-264.

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[11] The Circuit Court also indicated that even if the Fair Labor Standards Act were applicable to the respondents and their employees:

1. Eleven of the petitioners were clearly within the executive, administrative, and professional exemption established by Section 13(a)(1) of the Act;

2. Certain of the petitioners who were hired, discharged, and worked solely under the control and supervision of the Navy and its representatives were, in fact, employees of the Navy Department and not of the respondents;

3. The amounts awarded for overtime compensation and liquidation damages were erroneously computed on a regular hourly rate based upon a fictitious forty-hour workweek and were, therefore, excessive;

4. The petitioner's claims for liquidated damages were subject to the one-year statute of limitation prescribed by Section 731, Mississippi Code 1942; and

5. In any event, the respondents are still entitled to assert any new defenses authorized by the Portal-to-Portal Act of 1947, Public Law 49, 80th Cong. 1st Sess., which was enacted after entry of the judgment of the District Court. *Id.* at 262.

ARGUMENT

1. Petitioners contend that, with one exception,[12] this case presents substantially the same issues with respect to the effect of cost-plus contracts and wartime operations upon the coverage of the Fair Labor Standards Act as *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, and that the record in this case is adequate for the disposition of those issues.

This contention ignores the vital distinguishing fact that the judgment of the Circuit Court in the instant case is clearly correct without regard to the views which may ultimately be adopted on those issues. In the *Kennedy* case, *supra*, the employees, who worked in a government-owned munitions plant operated under a cost-plus-a-fixed-fee contract with the War Department, were unquestionably within the ambit of the Act unless its applicability was precluded by the cost-plus contracts and the wartime operations and legislation involved therein. On the other hand, the petitioners herein, even apart from the cost-plus and wartime aspects of the case, are on the undisputed record evidence not within the coverage of the Act.

As the record clearly shows, and as the Circuit Court recognized, the great majority of the petitioners were engaged in new and original construction of navy encampments in Mississippi. It has uniformly been held that individuals employed on such work are not "engaged in commerce or in the production of goods for commerce"

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[12] The question of the effect of the Act of July 2, 1940, c. 508, 54 Stat. 712.

within the meaning of the Fair Labor Standards Act.[13] This rule has been applied to individuals employed in activities which closely parallel those involved in the instant case. Thus, in *Cohen* v. *Cauldwell Wingate Co.*, 296 N. Y. 776, certiorari denied 332 U. S. 790, timekeepers and cost-clerks employed in connection with the new and original construction of an army camp were held to be outside the scope of the statute. Similarly, in *Soderberg* v. *S. Birch & Sons Construction Co.*, 163 F. 2d 37 (C. C. A. 9), certiorari denied 332 U. S. 816, clerks, typists, timekeepers, warehousemen, auditors, expediters, and storekeepers employed in connection with the construction of fortifications in the Aleutian islands were held to be outside the coverage of the Act.

The result consistently reached by the courts in the cases cited above is in accord with the official interpretation of the Act heretofore adopted by the Administrator of the Wage and Hour Division. Interpretative Bulletin No. 5, Paragraph 12 (1944-45 Wage and Hour Manual 23), Appendix, *infra*, p. iii, et seq. The Administrator's view is particularly pertinent here since he referred to army barracks as an example of the type of new construction not within the Act. 1944-1945 Wage and Hour Manual 32-33, Appendix, *infra*, p. iv.

Under the foregoing rulings, it is clear that the petitioners whose work related solely to new and original con-

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[13] *Barbe* v. *Cummins Const. Corp.*, 138 F. 2d 667 (C. C. A. 4); *Noonan* v. *Fruco Const. Co.*, 140 F. 2d 633 (C. C. A. 8); *Parham* v. *Austin Co.*, 158 F. 2d 566 (C. C. A. 5); *Nieves* v. *Standard Dredging Corp.*, 152 F. 2d 719 (C. C. A. 1); *Scott* v. *Ford Bacon & Davis*, 55 F. Supp. 982 (E. D. Pa.); *Collins* v. *Ford, Bacon & Davis*, 66 F. Supp. 424 (E. D. Pa.); *Wells et al.* v. *Ford, Bacon & Davis*, 7 Labor Cases, Par. 61, 929 (W. D. Ky.), aff'd. without opinion, 145 F. 2d 240 (C. C. A. 6); *Damon* v. *Ford, Bacon & Davis*, 62 F. Supp. 446 (E. D. Pa.); *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C. C. A. 3).

struction of navy camps were not engaged in commerce within the meaning of the Fair Labor Standards Act.

Furthermore, the record discloses and the Circuit Court recognized that the petitioners, including those not engaged in new construction, failed to show that they, as distinguished from their employers, were engaged in commerce or in the production of goods for commerce. *Cf. Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571-572; *Kirschbaum* v. *Walling*, 316 U. S. 517. They failed to show a close relationship between their work and the interstate movement of materials or supplies. They neither handled, received, nor unloaded such materials or supplies. On the undisputed evidence, their work was not sufficiently closely related to interstate activities as to be a part thereof, and accordingly, they were not within the coverage of the Act. *Cf. McLeod* v. *Threlkeld*, 319 U. S. 491, 497.

The result reached by the Circuit Court in this case is not, as the petitioners suggest, in direct conflict with the decision of the Seventh Circuit in *Bell* v. *Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari granted 330 U. S. 817, order granting certiorari vacated and certiorari denied 330 U. S. 813. That case like the *Kennedy* case, *supra*, involved employees of a cost-plus operator of an ordnance plant who were clearly within the scope of the statute unless its applicability was precluded by the impact of cost-plus contracts and wartime operations. It did not involve the "in commerce" issues discussed above upon which we submit the result reached by the Circuit Court in this case is clearly correct.

2. Petitioners also contend that the decision of the Fifth Circuit is in conflict with certain enumerated decisions of this Court (Pet., p. 5) which deal with the question whether a contractor or cost-plus-a-fixed-fee contractor with the

United States is an agent or instrumentality of the United States.

This contention, however, is clearly without merit since the decision of the Circuit Court in this case does not rest on any holding that the respondents were agents or instrumentalities of the United States. Indeed, the Fifth Circuit expressly stated that on the record before it, it was "unable to pass upon the question of whether the defendants [respondents] here were independent contractors, or merely working as agents of the government." 168 F. 2d at 262.

CONCLUSION

For the reasons set forth above, the petition for certiorari herein should be denied.

Respectfully submitted,

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APPENDIX

1. The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*) read as follows:

> Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> (b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.
>
> Sec. 3. As used in this Act—
>
> (a) • • •
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among

the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) • • •

(g) "Employ" includes to suffer or permit to work.

(h) • • •

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

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(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

• • • •

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

• • • •

2. Paragraph 12 of Interpretative Bulletin No. 5,* promulgated by the Wage and Hour and Public Contracts

* Since the enactment of the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong. 1st Sess., 29 U. S. C. 251 *et seq.*), this bulletin has been superseded by an interpretive bulletin entitled "General Statement as to the Coverage of the Wage and Hours Provisions of the Fair Labor Standards Act of 1938" published in the Federal Register, July 11, 1947, 12 F. R. 4583. The new bulletin does not deal with coverage of employees of building and construction contractors.

Division, United States Department of Labor, reads as follows:

> The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act.

1944-1945 Wage and Hour Manual, pp. 32-33 reads as follows:

> Application to Individual Industries—Building and Construction.
>
> Statement by Wage and Hour Division summarizing rulings on construction operations.
>
> Key to the Division's position lies in the fact that it regards the reconstruction, maintenance or repair of buildings used to produce goods sold across state lines as work necessary to the production of goods for commerce within the meaning of the Act. New construction, however, is usually not considered subject to the law unless the construction is "an integral part of the production of a specific type of goods for commerce."

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The distinction between original construction and reconstruction, together with the exceptions made by the Division to its general ruling, is explained, with clarifying examples, in the opinion which follows in full:

Applicability of the Fair Labor Standards Act to employees of building construction contractors

The opinions of the Wage and Hour Division regarding the applicability of the Fair Labor Standards Act to employees of building and construction contractors are set forth in paragraphs 12 and 13 of Interpretative Bulletin No. 5. Because of a number of requests for information which we have received in recent months regarding the applicability of the Act to the types of employees described therein we feel it advisable to clarify the principles stated in these paragraphs in their applicability to certain situations which have been called to our attention.

1. The General Construction of Buildings.

A. *General*

It is stated in paragraph 12 of Interpretative Bulletin No. 5 that "The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the act, even if the buildings when completed will be used to produce goods for com-

merce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the act."

B. *Typical Examples of No Coverage*

Typical cases of original construction of buildings in which it is the opinion of the Wage and Hour Division that the Fair Labor Standards Act, has no application are those of employees engaged in the original construction of homes, apartments, churches, schools and army barracks. Moreover, it is the Division's opinion, as pointed out in paragraph 12, that generally employees engaged in the original construction of buildings are not within the coverage of the Act even though the buildings when completed will be used to produce goods for commerce.

C. *Contractor Working in More Than One State*

The mere fact that a construction contractor performs construction work in several states would not affect the status of his employees under the Act if such employee would not otherwise be within its coverage. A typical case would be one in which a construction contractor maintained his principal office in state A and contracted to erect homes and apartment houses in states B and C. Unless the employees engaged in construction in states B and C were engaged in transporting goods, machinery, or materials across state lines, or in other forms of interstate commerce, their employment would not be subject to the Act.

D. *Situations involving original construction where such construction is an integral factor in the production of goods for commerce and intimately related thereto.*

While it is stated in paragraph 12 of Interpretative Bulletin No. 5 that employees engaged in the original construction of buildings are not generally within the scope of the Act, it should not be inferred from this statement that no employees engaged in the original construction of any structure would fall within the coverage of the Act. In the opinion of the Division, employees engaged in the original construction of structures, where such construction must practically be viewed as an integral part of the production of a specific type of goods for commerce, are covered by the Act.

Thus, for example, employees engaged in the original construction of oil derricks and in related construction activities are engaged in processes or occupations necessary to the production of goods within the meaning of Section 3 (j) of the Act. An oil derrick is erected solely to the end of conducting the subsequent drilling operations as a direct result of which the oil is to be produced. When it is considered that such a derrick, when once erected, cannot conceivably serve any other productive purpose, it becomes apparent that the construction thereof is properly to be regarded as an integral step in the actual drilling operations. It is distinguishable from the construction of a factory building which is intended to produce specific types of commodities. The utility of such a factory building is not limited to the production of the commodity originally contem-

plated. There are numerous instances in which, because of economic factors, such as fluctuations in the demands for various factory products, plants have been remodelled, new machinery installed, and commodities entirely different from those originally contemplated have been produced. This obvious distinction urges us to the conclusion that employees who construct an oil derrick should be viewed as engaged in the process of production, but that employees who construct a building in which goods for commerce are to be produced should be regarded as a step removed from actual productive operations. For the same reason as is applicable to oil derrick construction, such operations as clearing land, digging pits, and building certain earthen fire walls, in connection with oil drilling operations are properly to be regarded as within the general coverage of the Act.

The application of the general principle expressed above is limited to the original construction of oil derricks and related construction activities. The situation in which an oil derrick is constructed has been discussed merely to illustrate the operation of the general principle within which it falls.